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No. 93-2098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.L. GRIMES and G.W. HOLBROOK, on their own behalf and on behalf of all persons similarly situated,
Petitioners,

v.

VITALINK COMMUNICATIONS CORPORATION, a Corporation; NETWORK SYSTEMS CORPORATION, a Corporation; LESLIE G. DENEND, J. DANIEL MCCRANIE, CHARLES J. ABBE, HARRY T. REIN, and LYLE D. ALTMAN,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Most of the arguments in respondents' brief in opposition ("Resp. Br.") were fully dealt with in our petition ("Pet."). We address here one claim that the key issue is precluded under prior adjudication principles, and one claim that an issue was not sufficiently raised below; and we correct some of respondents' erroneous assertions.

The key issue (Resp. Br. 13-21). The key issue is whether a state court from which Congress has carefully withheld any authority over a federal securities claim can nevertheless confer power to release that claim upon an agent and force that agent upon the owner of the claim.

Respondents never address that question. Instead, they knock down a semantic straw man. The question

is not a state court's "*authority to approve* a settlement of a class action that releases claims within the exclusive jurisdiction of the federal courts," not "whether a state court ha[s] *authority to approve* a settlement that releases claims," not whether the state court had "the *authority to approve* a settlement releasing claims within the exclusive jurisdiction of the federal court," and so on and on. Resp. Br. i Question 2, 1, 3, 12, 13, 16 (emphasis added). A court can *approve* anything it wants to; the question here is the *effect* of that approval on the case at bar.[1]

> " '[T]he binding force of a particular action cannot be determined accurately by the court which hears the class suit, for that court is ill-equipped to test the adequacy of the representation of absent class members, the sufficiency of notice given, or even the general fairness of the proceeding. Since these questions can best be answered realistically with respect to a particular person, *the ultimate effect of the class action judgment will be determined when it is introduced in a subsequent action to bind persons not parties to the original action.*' Note, Binding Effect of Class Action, 67 Harv. L. Rev. 1059, 1060."

Cherner v. *Transitron Electronic Corp.*, 221 F. Supp. 48, 53 (D. Mass. 1963) (Wyzanski, J.) (emphasis added); *accord, Research Corp.* v. *Edward J. Funk & Sons Co., Inc.*, 15 FED. R. SERV. 2D 580 (N.D. Ind. 1971). And see in particular the discussion in *In Re Real Estate Title and Settlement Services Litigation,*

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[1] GLENDOWER. I can call spirits from the vasty deep.

HOTSPUR. Why, so can I, or so can any man;
But will they come when you do call for them?

HENRY IV, PART I, Act 2, Scene 4.

869 F.2d 760, 769 (3d Cir.), *cert. denied,* 493 U.S. 821 (1989).

(A kindred misformulation is "the authority of the state court to release claims," whether the state court had "subject matter jurisdiction to release the Petitioners' federal claims," and so on, a misformulation repeated at least seventeen times. Resp. Br. i Question 1, 3 (twice), 12 (twice), 13, 14 (three times), 15 (twice), 18, 19-20, 21, 29 (three times). *Courts* do not release claims; *people* release claims. The question is whether the *people* who purported to release Grimes's and Holbrook's claims could get from a state court the power to do so.)

Respondents' misformulation is more than a terminological inexactitude, for it is the predicate for an argument that petitioners are somehow here precluded under the principle of *Underwriters National Assurance Co.* v. *North Carolina L. & A. & H. T. G. Asso.,* 455 U.S. 691 (1982) (an argument that was made to the court below and ignored by it). In that case, a North Carolina association voluntarily litigated in an Indiana court the rights to a fund situated in North Carolina. The Indiana court held it had jurisdiction over the fund and made determinations as to rights in it. In a North Carolina state action the association then contended that it was not bound by the Indiana judgment because the Indiana court had not had jurisdiction over the fund. This Court, per Marshall, J., held that for a judgment in one state to be binding in another under the full faith and credit clause, the court rendering the judgment must have had jurisdiction to do so; but that that question of jurisdiction can itself be foreclosed by the prior adjudication. Under the circumstances, since in the Indiana case (a) the association had had a full and fair opportunity to litigate that issue and (b) the court

fully and fairly considered the question, the association was bound by the Indiana judgment. Respondents' implication is that here the question of the Delaware court's authority to approve the release is equivalent to the question of the Indiana court's jurisdiction over the fund in *Underwriters*, and that since Grimes and Holbrook had a "full and fair" opportunity to litigate that question in Delaware but did not do so, they are foreclosed from litigating that question in this action.

But the Delaware court's *authority to approve* the release is not the question Grimes and Holbrook raise here. The question here is the *effect of the release on this action.* And obviously that question was not litigated in the state court and could not have been. *Underwriters* is a *claim* preclusion case. The only way *Underwriters* could possibly be relevant here would be if Grimes and Holbrook had litigated a federal securities action in the Delaware state court and that court had held that it had subject-matter jurisdiction.[2]

What respondents assert here is *issue* preclusion. Under issue preclusion, "[a] judgment is not conclusive as to issues which might have been but were not litigated and determined in the prior action." RESTATEMENT, JUDGMENTS 2D § 27, Comment *e.* "In essence, the fundamental difference between claim preclusion and issue preclusion is that . . . only the former can operate to prevent litigation of a matter that has never been decided . . . ." *Stone* v. *Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992), *cert. denied*, 493 U.S. 959 (1993). Since appellees concede that neither

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[2] Even that would not foreclose the question, for in so egregious a case the principle of RESTATEMENT, JUDGMENTS 2D § 12(2) would surely be applied, under which a prior determination of jurisdiction will not be recognized if it "was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority."

Grimes nor (assuredly) Holbrook litigated this issue, however formulated, in the Delaware case, that disposes of this argument. (Note also that even in a case where *Underwriters* might otherwise apply, it does not apply if the first court did not address the jurisdictional issue. *Vickery* v. *Garretson*, 527 A.2d 293, 299 n.4 (D.C. 1987).)

We note also that *Underwriters* is predicated on a "full and fair" opportunity to litigate the issue allegedly precluded; yet even respondents admit that in view of governing state decisional law it would have been pointless to try to do so. Resp. Br. 14.

"**Actually litigated.**" Respondents' second effort to forestall addressing a major issue on the merits deals with our contention that the general evaluation of objections to a settlement, without presentation of evidence or decision on the merits, cannot be considered "actual litigation" of the issues resulting in issue preclusion. Pet. 21-23. Respondents' suggestion that this is an argument not raised below is simply wrong. Thus, at p. 13 of our petition for rehearing below we said:

> "The meaning of 'actually litigated' in this context has been settled for centuries. It refers to a fact question 'necessarily within the issue presented, and without proof of which the judgment could not have been rendered,' *Eastman* v. *Symonds*, 108 Mass. 567, 569 (1871), which was put in issue by the pleadings and submitted to and determined by the trier of fact. *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 459 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); *Halyalker* v. *Board of Regents*, 72 N.Y. 261, 527 N.E.2d 1222, 532 N.Y.S.2d 85 (1988). Nothing of the sort happened in the settlement hearings with respect to disclosure claims. They came up solely

> in the context that Grimes argued that they existed and were too valuable to be given up for a derisory consideration. The 'facts that underlie' the present claim are such matters as whether the solicitation papers contained misstatements, whether they were material, whether material information was withheld, and the like. Nothing of this kind was either tried or determined at the settlement hearing, and under Delaware law it would have been improper to do so."

This issue was raised and preserved from the inception of this litigation. Section II.B.3 of our main brief in the court below was entitled "Grimes and Holbrook Have Never Litigated Any Disclosure Issue and the Holding That the Delaware Proceeding Collaterally Estops Them in This Action Is Wholly Erroneous," and at p. 47 we said: "[N]o disclosure questions were 'litigated' at the hearing on the settlement. As noted, the consolidated complaint did not even raise any disclosure issues; disclosure was brought up by the objectors, in the context of weighing the value of the consideration against what the settlement would give up." At p. 49 of our brief below we quoted the Haudek article quoted at Pet. 22-23. We pointed out at p. 48 of our brief below that the district court "could not quite bring itself to say that the disclosure issues were 'determined'; it said only that 'the Chancery Court *made a determination relating to the merits of* 'the objectors' disclosure claims,' " App. 50a. In our reply brief below, at 19-20, we said: "No issue here material was *litigated* in the relevant sense in the Delaware proceedings by either appellant—most certainly not by Holbrook." And at pp. 43-44 of our brief before the district court we had pointed out that "no disclosure questions were 'litigated' at the hearing on the settlement" and that "to have actually litigated

the disclosure claims would have violated" governing Delaware case law.

Respondents' suggestion that we are somehow belatedly attempting "to ask this Court to reevaluate the Delaware law of collateral estoppel," Resp. Br. 26, is rhetorical overkill. We claim, and have claimed throughout, that the issues here involved were not "actually litigated" in the state court in any sense that would lead to preclusion in this federal action.

Miscellaneous matters. Turning now to some specific observations on respondents' brief:

1. We pointed out at Pet. 20-21 that, loose dicta notwithstanding, most of the appellate decisions on which respondents rely to support the decisions below on the key issue actually reflect federal courts' pendent jurisdiction over state claims, as contrasted with state courts' congressionally-decreed lack of power over federal claims. That "both situations reflect the same jurisdictional issues," Resp. Br. 20, is simply not the case. We reiterate that the fountainhead of all these cases is the misapplication to *representative* cases of a decision in a *derivative* case, *Abramson* v. *Pennwood Investment Corp.*, 392 F.2d 759 (2d. Cir. 1968)—a distinction which Judge Friendly pointed out in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1980). Pet. 20. Respondents never address this crucial point and simply quote *National Super Spuds* out of context, Resp. Br. 19-20; this we dealt with fully at Pet. 25-26.

Incidentally, the "underlying concern . . . that a class representative might not fully advance the interests of class members," Resp. Br. 20, is exactly the concern articulated by Professor Coffee in his discussion of the collusion which the "Delaware settlement" makes possible. Pet. 15-16.

2. Respondents' repeated characterization of this case and the Delaware state cases as having the "same factual predicate," or a "common nucleus of operative facts," *e.g.* Resp. Br. 19, 20, 29, simply does not survive comparison of the two complaints. Pet. 4, Table 1 at 122a.

3. We reiterate that non-opt-out was a *fait accompli* in the class certification here (whatever it may have been in the case cited at Resp. Br. 23 n.6) which was not left open for petitioners to litigate. In any case, since the issue was concededly not litigated, it is not foreclosed here. See RESTATEMENT, JUDGMENTS 2D § 27, Comment *e, supra; Stone* v. *Williams, supra.*

4. Needless to say, we do not "concede that personal jurisdiction is irrelevant," Resp. Br. 27, to all aspects of the case. It is indeed irrelevant to the key issue whether the state court could validly force on petitioners an agent empowered to sell their exclusively federal claims. Pet. 21. Only in the unlikely event that the Court should disagree with our position on that key issue are other questions presented to which personal jurisdiction is relevant.

5. The argument at Resp. Br. 29 based on *Hynson* v. *Drummond Coal Co., Inc.*, 601 A.2d 570 (Del. Ch. 1991), confuses special and general jurisdiction and misstates the extent to which we "accepted" *Hynson* in the courts below. What we actually said below is quoted at Resp. Br. R18a-R19a and is worth quoting again:

> "*Hynson* holds *at most* only that a state court can exercise jurisdiction over all parties in a determination of *internal* corporate rights and duties. But what is here involved is rights and duties *external* to the corporation, growing out of failure to disclose information in the purchase of shares

> by an outsider. A Connecticut citizen cannot, in the language of *World-Wide Volkswagen Corp.* v. *Woodson*, 44 U.S. 286, 297 (1980), 'reasonably anticipate being haled into court' in Delaware with respect to an offer to buy his shares by a Minnesota-based entity; he has 'purposefully availed himself' of no 'privilege of conducting activities' in Delaware with respect to purchase and sale of stock. *Hanson* v. *Denckla*, 357 U.S. 235, 243 (1958); see *Burger King Corp.* v. *Rudewicz*, 471 U.S. 462 (1985); *De James* v. *Magnificence Carriers, Inc.*, 654 F. 2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). Otherwise millions of daily Wall Street transactions would all be subject to Delaware jurisdiction."

In this connection, respondents' concession that Holbrook "tendered his shares into the Offer," Resp. Br. 5, demolishes the underpinnings of the holding below as to him. See Pet. 24.

6. The wire service releases printed at Resp. Br. R3a-R5a were not part of the record below. There is no evidence that any party saw them. We are not sure why they are brought forth now.

Conclusion

Nothing in respondents' brief in opposition meets the central propositions that the "Delaware settlement" and its potential for abuse and collusion has brought the law into public and scholarly disrepute and that its crucial element is the assumption of power by state courts to authorize the disposal of federal claims over which Congress has denied them any authority. No case has actually analyzed the question of a state court's power to force upon a party an agent empowered to give away his exclusively federal rights. The cases cited by respondents to support this power

form in reality nothing more than an all-too-familiar type of 'daisy chain" in which each decision routinely cites those before it. And the whole chain is anchored not in a class action but in a derivative suit, with respect to which, as Judge Friendly has so eloquently pointed out, the analysis is totally different. Bad law is all too easily made by unreflecting repetition of this kind, unless an authoritative court—this Court—makes a firm analysis from basic principles before it is too late. The Court should do so in this case.

Respectfully submitted,

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